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Jeyasurian a/l Periasamy v Periasamy a/l Vellasamy

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N–02–1052–05 OF 2013
DAVID WONG, UMI KALTHUM AND ABDUL RAHMAN SEBLI JJCA
22 NOVEMBER 2016

C

Land Law — Transfer — Form — Original owner transferred land to son — Allegations that son committed conspiracy, committed fraudulent misrepresentation and undue influence to original owner — Whether conspiracy, committed fraudulent misrepresentation and undue influence resulted in transfer — Original owner executed Form 14A and transferred land to son — Whether original owner understood language and contents of Form 14A — Whether there was fraudulent misrepresentation and undue influence

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The respondent ('the plaintiff') was the father of the appellant ('the first defendant') and the original owner of a piece of land. According to the plaintiff, the first and second defendants had, by way of a conspiracy, committed fraudulent misrepresentation and/or exercised undue influence on the plaintiff which resulted in the transfer of the said land to the first defendant. The first defendant contended that the plaintiff had the knowledge of the transfer and understood the same because the Assistant Land Administrator of the Seremban Land Office ('DW1') had explained the contents of Form 14A to the plaintiff in the presence of the plaintiff's wife ('SP2') and the first and second defendants. The explanation by DW1 was done in Bahasa Melayu and the plaintiff had confirmed that he understood Bahasa Melayu and the intent and purposes of signing Form 14A. However, the plaintiff later initiated an action at the High Court on the ground that the first defendant and the second defendant had jointly conspired to defraud the plaintiff of the said land. According to the plaintiff, he was under the assumption that the whole transaction was for the purpose of obtaining a new title deed to replace the old title deed, as falsely represented to him by the first and second defendants; the first and second defendants had fraudulently induced the plaintiff who was of old age, infirm and illiterate to sign the Form 14A with the intention of transferring the said land to the first defendant; at the time of signing the Form 14A, he was not duly informed of the contents of the Form 14A and the effect and consequences of such transaction; and the first and second defendants had not only used undue influence but had fraudulently misrepresented him on the said transaction. After a full trial, the High Court judge allowed the plaintiff's claim for conspiracy, fraudulent misrepresentation and the exercise of undue influence against the plaintiff by the first defendant. Hence, the present appeal. The main issues to be determined were whether

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there was a fraudulent misrepresentation by the first defendant to the plaintiff; and whether there was an act of undue influence by the first defendant on the plaintiff, the result of which had led to the transfer of the said land from the plaintiff to the first defendant.

Held, allowing the appeal with costs:

(1) **(per Umi Kalthum JCA, majority)** There was no fraudulent misrepresentation in relation to the said transfer. The plaintiff was fully aware the transaction that took place at the land office was for the transfer of the said land to the first defendant. He was accompanied not only by the first defendant, but also by SP2 and the second defendant. The contents of the Form 14A and the effect and consequences of the transaction was duly explained by DW1 and the plaintiff's act of nodding his head was a clear indication that he understood the whole process (see paras 27–28).

(2) **(per Umi Kalthum JCA, majority)** The plaintiff's assertion that he did not understand Bahasa Melayu and thus did not understand the whole transaction to be untenable. It would be highly improbable for a man at the age of 72 years old who had grown up and worked in Malaysia his whole life was not able to understand even the basic Bahasa Melayu. A reasonable man would have presumed that a man entering into a transaction such as this would not have proceeded with it had he not understood anything as alleged by the plaintiff, but the plaintiff to the contrary, had proceeded with the transaction. A reasonable inference could made that his alleged non-understanding of Bahasa Melayu was just a mere assertion (see para 29).

(3) **(per Umi Kalthum JCA, majority)** The Form 14A was executed by the plaintiff who was of the age of majority, a Malaysian citizen, who had executed the transfer voluntarily. The plaintiff not only understood Bahasa Melayu but he also understood the contents of the document and the nature of the transaction and its effect. There was no allegation by the plaintiff on the integrity of SD1's testimony. SD1 had discharged his duty accordingly and we took the view that SD1 was an independent/neutral witness to the transaction. As such, the transfer was done without any fraud (see paras 30 & 32).

(4) **(per Umi Kalthum JCA, majority)** The High Court judge had seriously misdirected herself when she found the first defendant had fraudulently misrepresented to the plaintiff on the transfer of the said land and at the same time found that the second defendant was not involved at all in the conspiracy with the first defendant, whereas the pleaded case of the plaintiff was that the first and second defendants had conspired together to defraud and misrepresent the plaintiff of the said land (see para 36).

(5) **(per Umi Kalthum JCA, majority)** There was an inconsistency in the finding of the High Court Judge on the issue of undue influence. The execution of the Form 14A by the plaintiff was made voluntarily, albeit he did not understand the contents of the form (which the court found to be otherwise). There was a material inconsistency in this finding that required an appellate intervention. Since the execution of the transfer was made voluntarily, in the circumstances of this case the alleged exercise of undue influence upon the respondent was non-existent (see paras 37–38).

(6) **(per Abdul Rahman Sebli JCA, dissenting)** The trial judge had properly and adequately dealt with the evidence and had not misdirected herself, either in law or on the facts. Her Ladyship had sufficiently applied her mind to all the relevant evidence and issues before the court and her conclusion was reached after a careful assessment and evaluation of the conflicting versions of events. That being the case, it would be wrong to substitute her conclusion (see para 53).

(7) **(per Abdul Rahman Sebli JCA, dissenting)** There was evidence that the plaintiff's solicitors had written to the first defendant asking him to rebut the allegation that the transfer was done by misrepresentation, fraud and undue influence. Despite the seriousness of the allegation, the first defendant did not even bother to reply. It was clear that the first defendant failed to prove that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing (see paras 58–60).

[Bahasa Malaysia summary

Responden ('plaintif') adalah bapa perayu ('defendan pertama') dan pemilik asal sekeping tanah. Menurut plaintif, defendan-defendan pertama dan kedua telah, melalui suatu konspirasi, melakukan salah gambaran yang berunsur fraud dan/atau menggunakan pengaruh yang tidak patut ke atas plaintif sehingga mengakibatkan pemindahan tanah tersebut kepada defendan pertama. Defendan pertama berhujah bahawa plaintif mempunyai pengetahuan tentang pemindahan itu dan memahami yang sama kerana Penolong Pentadbir Tanah di Pejabat Tanah Seremban ('DW1') telah menjelaskan kandungan Borang 14A kepada plaintif kepada plaintif dengan kehadiran isteri plaintif ('SP2') dan defendan-defendan pertama dan kedua. Penjelasan oleh DW1 telah dilakukan dalam Bahasa Melayu dan plaintif telah mengesahkan bahawa dia memahami Bahasa Melayu and niat dan tujuan menandatangani Borang 14A. Walau bagaimanapun, plaintif kemudian telah memulakan tindakan di Mahkamah Tinggi atas alasan bahawa defendan pertama dan defendan kedua telah bersesama berkonspirasi untuk menipu plaintif tentang tanah tersebut. Menurut plaintif, dia beranggapan bahawa

keseluruhan transaksi adalah bagi tujuan memperoleh hak milik baru untuk menggantikan hak milik lama, yang telah digambarkan secara palsu kepadanya oleh defendan-defendan pertama dan kedua; defendan-defendan pertama dan kedua telah secara menipu mendorong plaintif yang tua, lemah dan buta huruf untuk menandatangani Borang 14A dengan niat memindah tanah tersebut kepada defendan pertama; pada masa penandatanganan Borang 14A, dia tidak diberitahu tentang kandungan Borang 14A dan kesan dan akibat transaksi tersebut; dan defendan-defendan pertama dan kedua bukan sahaja menggunakan pengaruh secara tidak wajar tetapi telah secara menipu menyalahnyatakan dirinya tentang transaksi tersebut. Selepas perbicaraan penuh, hakim Mahkamah Tinggi telah membenarkan tuntutan plaintif untuk konspirasi, salah nyata secara fraud dan penggunaan pengaruh secara tidak wajar terhadap plaintif oleh defendan pertama. Justeru, rayuan ini. Isu-isu utama untuk ditentukan adalah sama ada terdapat tindakan salah nyata secara menipu oleh defendan pertama kepada plaintif; dan sama ada terdapat perbuatan pengaruh secara tidak wajar oleh defendan pertama ke atas plaintif, akibatnya di mana telah membawa kepada pemindahan tanah tersebut daripada plaintif kepada defendan pertama.

Diputuskan, membenarkan rayuan dengan kos:

(1) **(oleh Umi Kalthum JCA, majoriti)** Tiada salah nyata secara fraud berkaitan pemindahan tersebut. Plaintif menyedari sepenuhnya tentang transaksi yang berlaku di pejabat tanah itu adalah untuk pemindahan tanah tersebut kepada defendan pertama. Dia bukan sahaja ditemani oleh defendan pertama, tetapi juga oleh SP2 dan defendan kedua. Kandungan Borang 14A dan kesan dan akibat transaksi tersebut telahpun dijelaskan oleh DW1 dan perbuatan plaintif mengangguk kepadanya adalah tanda yang jelas bahawa dia memahami keseluruhan proses itu (lihat perenggan 27–28).

(2) **(oleh Umi Kalthum JCA, majoriti)** Penegasan plaintif bahawa dia tidak memahami Bahasa Melayu dan oleh itu tidak memahami keseluruhan transaksi itu tidak dapat dipertahankan. Ia akan menjadi sangat tidak mungkin bagi seorang lelaki pada usia 72 tahun yang telah membesar dan bekerja di Malaysia seluruh hidupnya tidak dapat memahami walaupun asas Bahasa Melayu. Seorang lelaki yang munasabah akan dianggap bahawa seorang lelaki yang memasuki transaksi seperti ini tidak akan meneruskan dengannya jika dia tidak memahami apa-apa seperti yang didakwa oleh plaintif, tetapi plaintif sebaliknya, telah meneruskan dengan transaksi itu. Satu kesimpulan yang munasabah boleh dibuat bahawa dakwaan dia tidak faham Bahasa Melayu adalah hanya suatu dakwaan semata-mata (lihat perenggan 39).

(3) **(oleh Umi Kalthum JCA, majoriti)** Borang 14A telah disempurnakan oleh plaintif yang berumur majoriti, seorang warganegara Malaysia, yang

telah menyempurnakan pemindahan itu secara sukarela. Plaintif bukan sahaja tidak memahami Bahasa Melayu tetapi dia juga memahami kandungan dokumen itu dan sifat transaksi dan kesannya. Tiada dakwaan oleh plaintif tentang integriti berhubung testimoni SD1. SD1 telah melaksanakan kewajipannya dengan wajar dan mahkamah berpendapat bahawa SD1 adalah saksi bebas/neutral kepada transaksi tersebut. Oleh itu, pemindahan itu telah dilakukan tanpa apa-apa fraud (lihat perenggan 30–32).

(4) **(oleh Umi Kalthum JCA, majoriti)** Hakim Mahkamah Tinggi telah salah arah apabila beliau mendapati defendan pertama telah salah nyata secara fraud kepada plaintif berhubung pemindahan tanah tersebut dan pada masa sama mendapati bahawa defendan kedua tidak terlibat langsung dalam konspirasi dengan defendan pertama, manakala kes yang dipli oleh plaintif adalah bahawa defendan-defendan pertama dan kedua telah berkonspirasi bersama untuk menipu dan salah nyata plaintif berhubung tanah tersebut (lihat perenggan 36).

(5) (**oleh Umi Kalthum JCA, majoriti**) Penemuan hakim Mahkamah Tinggi tidak konsisten berhubung isu pengaruh secara tidak wajar. Pelaksanaan Borang 14A oleh plaintif telah dibuat secara sukarela, meskipun dia tidak memahami kandungan borang itu (yang mana mahkamah mendapati adalah sebaliknya). Terdapat ketidakselarasan material dalam penemuan ini yang memerlukan campur tangan rayuan. Oleh kerana pelaksanaan pemindahan itu telah dibuat secara sukarela, dalam keadaan kes ini amalan pengaruh secara tidak wajar yang didakwa ke atas responden tidak wujud (lihat perenggan 37–38).

(6) **(oleh Abdul Rahman Sebli HMR, menentang)** Hakim perbicaraan telah dengan wajar dan secukupnya mengendalikan keterangan itu dan tiada salah arah dirinya, sama ada dari segi undang-undang atau berdasarkan fakta. Hakim secukupnya menumpukan mindanya kepada semua keterangan dan isu yang relevan di hadapan mahkamah dan kesimpulan beliau dibuat selepas penelitian dan penilaian teliti berhubung percanggahan versi-versi tentang kejadian. Oleh demikian, adalah salah untuk menggantikan kesimpulan beliau (lihat perenggan 53).

(7) **(oleh Abdul Rahman Sebli HMR, menentang)** Terdapat keterangan bahawa peguamcara plaintif telah menulis kepada defendan pertama memintanya mematahkan dakwaan bahawa pemindahan itu telah dilakukan melalui salah nyata, fraud dan pengaruh yang tidak wajar. Walaupun dakwaan itu serius, defendan pertama tidak hirau pun untuk menjawab. Ia jelas bahawa defendan pertama telah gagal membuktikan bahawa hadiah itu dibuat selepas sifat dan kesan transaksi tersebut telah diperjelaskan sepenuhnya kepada penderma oleh orang yang bebas dan berkelayakan dengan sepenuhnya untuk memuaskan mahkamah bahawa

penderma itu telah bertindak bebas daripada apa-apa pengaruh daripada penerima kuasa dan dengan pemahaman penuh tentang apa yang dilakukan olehnya (lihat perenggan 58–60).]

Notes

For cases on transfer in general, see 8(3) *Mallal's Digest* (5th Ed, 2015) paras 5666–5760.

Cases referred to

Benmax v Austin Motor Co Ltd [1955] AC 370, HL (refd)
Chow Yee Wah & Anor v Choo Ah Pat [1978] 2 MLJ 41b, PC (refd)
Inche Noriah v Shaik Allie bin Omar [1929] AC 127, PC (refd)
Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 MLJ 394; [2010] 5 CLJ 32, CA (refd)
Samar binte Mansor v Mustafa Kamarul Ariffin [1974] 2 MLJ 71, FC (refd)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 7 CLJ 584, FC (refd)

Legislation referred to

Evidence Act 1950 s 111
National Land Code Form 14A

Appeal from: Civil Suit No 22–214 of 2010 (High Court, Seremban)

Gurdit Singh (Shankar Ramachandran and Chrysandy Lai Zhiu Khiok with him) (Shariff & Khoo) for the appellant.
Krishan Dallumah (Indran Kumaraguru and Yong Yoong Hui with him) (Krishnan Dallumah, Manian & Indran) for the respondents.

Umi Kalthum JCA (delivering majority judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the High Court dated 3 April 2013 after a full trial when the learned High Court judge allowed the plaintiff's claim for conspiracy, fraudulent misrepresentation and the exercise of undue influence against the plaintiff/respondent by the first defendant/appellant. For ease of reference we will refer the parties as they were in the High Court matter.

BRIEF FACTS OF THE CASE

[2] The plaintiff, one Periasamy s/o Vellasamy, is the father of the first defendant, one Jeyasurian s/o Periasamy, and the original owner of a piece of land held under GM91, Lot 2555 at Mukim Rasah, in the District of Seremban, Negeri Sembilan ('the said land').

[3] The plaintiff alleged that the first defendant together with the second defendant, one Jeyaraman s/o Sivaperumal, had by way of a conspiracy committed fraudulent misrepresentation and/or exercised undue influence on the plaintiff. As a result of that fraudulent misrepresentation and/or undue influence, the plaintiff had transferred the said land to the first defendant.

THE APPELLANT'S/FIRST DEFENDANT'S CASE

[4] The first defendant contended that the plaintiff had the knowledge of the transfer. The plaintiff had understood the transfer because the Assistant Land Administrator of the Seremban Land Office, Mr Mohd Nor bin Ibrahim ('DW1') had explained the contents of the Form 14A to the plaintiff. This explanation was done in the presence of the plaintiff's wife, the second defendant and the first defendant.

[5] The explanation by DW1 was done in Bahasa Melayu. The plaintiff had confirmed that he understood Bahasa Melayu and he also understood the intent and purposes of signing Form 14A which was to transfer the said land to the first defendant.

[6] The plaintiff's wife also understood Bahasa Melayu.

[7] Three weeks after the signing of Form 14A, the plaintiff had on 27 April 2009 sought the advice of Messrs Thavamani & Partners concerning the stamp duty payable to the amount of RM21,000. The plaintiff had the knowledge that the first defendant had paid the stamp duty.

[8] The first defendant subsequently conducted a 'ground-breaking prayers ceremony' on the said land on 17 January 2010. This was done before the construction of the first defendant's house on the said land. The plaintiff, the plaintiff's wife, their daughter named Jayarani d/o Periasamy and her family members had attended the said prayers.

[9] Further, on 7 March 2010, the construction of the first defendant's house on the said land was already halfway through completion. A prayer was conducted at a temple built on the said land attended by the plaintiff and other family members. The plaintiff was fully aware that the first defendant was building a house on the land that was transferred to the first defendant by the plaintiff.

[10] In addition to that, the 'Approved Building Plans' was shown to the plaintiff and the plaintiff's wife before the commencement of the construction of the house.

[11] Apart from that, sometime in December 2009 the eldest sister to the plaintiff's wife had passed away and at the funeral, the plaintiff had informed his in-laws that the said land had been transferred to the first defendant.

[12] The plaintiff had been influenced by his daughters and in-laws to file the action because they were jealous of the fact that the plaintiff had transferred the said land solely to the first defendant.

THE RESPONDENT'S/PLAINTIFF'S CASE

[13] The plaintiff's main contention against the first defendant was that the first defendant and the second defendant had jointly conspired to defraud the plaintiff of the said land.

[14] The plaintiff contended that he was under the assumption that the whole transaction was for the purpose of obtaining a new title deed to replace the old title deed. The plaintiff alleged that the first defendant and the second defendant had falsely represented to him that he had to sign a transfer form for the aforementioned reason.

[15] The plaintiff also alleged that the first defendant and the second defendant had fraudulently induced the plaintiff who is of old age, infirm and illiterate to sign the Form 14A with the intention of transferring the said land to the first defendant.

[16] The plaintiff further alleged that at the time of signing the Form 14A, he was not duly informed of the contents of the Form 14A and the effect and consequences of such transaction.

[17] The plaintiff only found out about the alleged fraud sometime in April 2010 when the plaintiff was alerted by his family members of the transfer of the said land that had taken place.

[18] The plaintiff contended that the first defendant and the second defendant had not only used undue influence on him who is of an old age, infirm and illiterate but had fraudulently misrepresented him on the said transaction.

THE DECISION OF THE HIGH COURT

[19] The High Court had allowed the plaintiff's claim as follows:

(a) that the first defendant had fraudulently misrepresented to the plaintiff that the Form 14A that the latter was asked to sign was in fact a form for the issuance of a new title to replace the old title of the said land; and

(b) that the first defendant had exercised undue influence upon the plaintiff to sign the Form 14A. The High Court made a finding that the first defendant had failed to prove that the transaction was conducted in good faith pursuant to s 111 of the Evidence Act 1950.

(c) the High Court further decided that the second defendant had not committed any fraud or fraudulent misrepresentation when the plaintiff signed the Form 14A and had not assisted the first defendant in committing the same.

[20] The High Court made the following orders:

(a) the plaintiff's/respondent's claim against the first defendant/appellant was allowed with costs of RM5,000;

(b) the plaintiff's/respondent's claim against the second defendant was dismissed with costs of RM2,000;

(c) the first defendant was allowed to maintain one-sixth (1/6) share in the said land held under /GM91, Lot 2555, at Mukim Rasah, in the District of Seremban, Negeri Sembilan together with a house built on the said land;

(d) the first defendant shall be liable to pay the loan obtained by him from Public Bank Bhd;

(e) 5/6 share of the said land shall be re-transferred to the plaintiff subject to the charge; and

(f) liberty to apply.

THE APPEAL

[21] The main issues to be determined for the purpose of this appeal are as follows:

(a) whether there was a fraudulent misrepresentation by the first defendant to the plaintiff;

(b) whether there was an act of undue influence by the first defendant on the plaintiff, the result of which had led to the transfer of the said land from the plaintiff to the first defendant.

Whether there was a fraudulent misrepresentation by the first defendant to the plaintiff

[22] The plaintiff's allegation of fraud was at the time of the signing of the Form 14A. It was alleged by the plaintiff that he was informed by the first defendant that the whole transaction was for the purpose of obtaining a new title deed to replace the old title deed.

[23] The learned High Court judge had concluded in her grounds of judgment that the plaintiff did not understand the contents and effects of the Form 14A due to the fact that the plaintiff does not understand Bahasa Melayu.

[24] On the issue of fraudulent misrepresentation, the majority opinion of the panel was in the negative for the reasons stated as follows.

[25] Reference is made to the plaintiff's ('SP1') testimony during examination-in-chief at p 40 of the record of appeal, Vol 3, at questions number 6, 7.

S6: Siapakah yang telah menyaksikan Encik Periasamy menandatangani Borang 14A tersebut?

J6: Seorang pegawai Melayu di Pejabat Tanah telah menyaksikan saya menandatangani dokumen tersebut. Beliau ada menyatakan sesuatu dalam Bahasa Melayu dan memandangkan saya tidak tahu bertutur mahupun faham Bahasa Melayu saya cuma mengangguk kepala saya tanda saya faham. Saya langsung tidak tahu maksud pegawai tersebut dan saya percaya secara keseluruhan terhadap kata-kata Defendan Pertama dan Kedua bahawa Dokumen tersebut hanya untuk menukar geran lama hartanah saya kepada geran yang baru.

S7: Bilakah anda mendapat tahu bahawa hartanah Encik Periasamy telah dipindahmilik secara fraud kepada Defendan Pertama?

J7: Pada lebih kurang bulan Februari 2010. Saya telah diwadkan di hospital kerana sakit yang sangat teruk secara tiba-tiba sehingga saya terpaksa membatalkan penerbangan saya ke India dan saya mengambil keputusan untuk membuat wasiat untuk mengagihkan hak dalam hartanah saya kepada semua anak saya secara adil dan saksama. Walaubagaimanapun, hanya pada ketika itu saya mendapat tahu bahawa hartanah tersebut tidak lagi berada atas nama saya dan kononya saya telahpun memindahmilikan hartanah tersebut kepada Defendan Pertama.

[26] Reference is also made to SP1's testimony during cross-examination at p 47 of the record of appeal, Vol 3, question number 23.

S23: Gambar-gambar ini diambil bila dan untuk upacara apa?

J23: Saya tidak tahu sebab gambar ini diambil tapi ini adalah upacara sembahyang sebelum bina rumah.

Question number 26 at p 48 of the same bundle.

S26: Sila lihat gambar foto tersebut. Adakah anak lelaki encik berada di dalam gambar itu?

J26: Anak lelaki (Defendan) saya berada di dalam gambar pertama. Gambar kedua juga ada gambar anak lelaki saya.

Question number 28 at p 48 of the same bundle.

S28: Jadi, encik tahu ini adalah upacara sembahyang untuk membina rumah di atas tanah tersebut?

J28: Ya.

[27] Based on the testimony of SP1 during examination-in-chief and after being cross-examined, we were of the majority view that there was no fraudulent misrepresentation in relation to the said transfer. The plaintiff was fully aware the transaction that took place at the land office was for the transfer of the said land to the first defendant.

[28] The plaintiff was accompanied not only by the first defendant, but also by his wife ('SP2') and the second defendant. The contents of the Form 14A and the effect and consequences of the transaction was duly explained by the assistant land administrator and the plaintiff's act of nodding his head was a clear indication that he understood the whole process.

[29] We found that the plaintiff's assertion that he does not understand Bahasa Melayu and thus did not understand the whole transaction to be untenable. It would be highly improbable for a man at the age of 72 years old who had grown up and worked in Malaysia his whole life was not able to understand even the basic Bahasa Melayu. A reasonable man would have presumed that a man entering into a transaction such as this would not have proceeded with it had he not understood anything as alleged by the plaintiff, but the plaintiff to the contrary, had proceeded with the transaction. A reasonable inference could made that his alleged non-understanding of Bahasa Melayu was just a mere assertion. In addition to that, the assistant land administrator ('SD1') who had nothing to gain from this transaction would have definitely noticed something was amiss if the plaintiff was not able to comprehend his explanation at all when he explained the contents of the document and the effects and consequences of the transaction.

[30] The Form 14A was executed by the plaintiff who is of the age of

majority, (72 years at time of trial) a Malaysian citizen, who had executed the transfer voluntarily and who understood the contents of the document and its effect. As such, we were of the view that the transfer was done without any fraud.

[31] We found that the learned High Court judge had erred in her finding, without stating her reasons for doubting the sincerity of SD1, when she found that SD1 had failed to act as an independent witness in clearly explaining the contents of the Form 14A to the plaintiff. She further added that the failure of SD1 to do so would only help the plaintiff's case. It is crucial to note that SD1 had nothing to gain from this transaction. He had discharged his duties accordingly. We refer to SD1's testimony during examination-in-chief at p 58 of the record of appeal, Vol 3, as follows:

S10: Selain daripada menerangkan kepada pemberi (En. Periasamy) berkenaan dengan borang pindahmilik tersebut, adakah En. Mohd Nor ada membuat perbualan dengan En. Periasamy dan juga isteri beliau?

J10: *Saya hanya tanya dia nak bagi siapa tanah ini kepada En. Periasamy dan dia bersetuju untuk beri tanah ini kepada En. Jeyasurian.*

S11: Adakah En. Periasamy bercakap dalam Bahasa Melayu?

J11: *Ya, dia bercakap dengan Bahasa Melayu.*

S12: Adakah isteri Plaintif bercakap dengan encik?

J12: Saya tidak ingat tapi saya ingat En. Periasamy bercakap dalam Bahasa Melayu.

S13: *Tadi, En. Mohd Nor berkata bahawa apabila En. Mohd Nor berpuas hati baru encik akan mengisi dan juga menandatangani Borang 14A sebagai saksi. Adakah En. Mohd Nor berpuas hati dengan pindahmilik oleh En Periasamy kepada En. Jeyasurian?*

J13: *Ya, selepas dia bersetuju, saya hanya menyaksikan sahaja.*

S14: *Jadi, En Mohd Nor boleh mengesahkan bahawa En. Periasamy faham Bahasa Melayu?*

J14: *Ya, saya boleh sahkan.*

(Emphasis added.)

At cross-examination at p 61 of the record of appeal, Vol 3, SD1 further explained on the understanding of the plaintiff of the transfer of the said land.

S19: *Macam mana awak tahu dia faham?*

J19: *Sebab sebelum dia tandatangan, saya ada tanya dia nak beri kepada siapa. Selepas itu dia setuju baru kita tandatangan. Selagi, dia tidak*

setuju saya tidak akan tandatangan.

(Emphasis added.)

[32] This clearly showed that the plaintiff not only understood Bahasa Melayu but he also understood the contents of the document and the nature of the transaction and its effect. There was no allegation by the plaintiff on the integrity of SD1's testimony. SD1 had discharged his duty accordingly and we took the view that SD1 was an independent/neutral witness to the transaction.

[33] The plaintiff's contention that he was only aware of the transfer of the said land while he was in a hospital was also untenable. The plaintiff had on several occasions indicated that he was aware of the transfer and had knowledge of the transfer well before then. He had attended a 'ground-breaking prayers' ceremony for the house built on the said land. The approved building plan was also shown to him and the plaintiff himself had in December 2009, at the funeral of his sister-in-law, informed his in-laws that he had transferred the said land to the first defendant.

[34] Another important factor which we observed was the notion that the transaction was for the renewal of title deed was never raised by the first defendant. The plaintiff's wife ('SP2') testified that it was SD1 who informed her that the purpose of the Form 14A was to renew the title deed. She did not assert that it was the first defendant who had made such an assertion or representation to the plaintiff. There was no evidence by SP2 to suggest the same.

[35] As such, we found that, on the balance of probabilities, there was no fraudulent misrepresentation by the first defendant on the plaintiff. To this end, and based on the recent decision of the Federal Court in *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584, the standard of proof for fraud in civil cases, as in this case, is on the balance of probabilities. See per Richard Malanjum CJ (Sabah and Sarawak) at p 17(MLJ); p 597(CLJ), para 49, as follows:

> [49] With respect, we are inclined to agree with learned counsel for the plaintiff to the correct principle to apply is as explained in *In re B (Children)*. It is this: *that at law there are only two standards of proof, namely, beyond reasonable doubt for criminal cases while it is on the balance of probabilities for civil cases. As such even if fraud is the subject in a civil claim the standard of proof is on the balance of probabilities. There is no third standard*. And '(N)either the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts'. (Emphasis added.)

[36] Ultimately we found that the learned High Court judge had seriously

misdirected herself when she found the first defendant had fraudulently misrepresented to the plaintiff on the transfer of the said land and at the same time found that the second defendant was not involved at all in the conspiracy with the first defendant, whereas the pleaded case of the plaintiff was that the first and second defendants had conspired together to defraud, misrepresent, the plaintiff of the said land. In *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394; [2010] 5 CLJ 32 (CA), KN Segara JCA (as he then was and delivering the judgment of the court) laid down the elements of the tort of conspiracy, at p 406(MLJ); p 48(CLJ), paras 32 and 33, as follows:

> [32] In regard to the tort of conspiracy, the following need to be satisfied at this interlocutory stage:
>
> (a) an agreement between two or more persons (that is an agreement between Tan Chong & others);
>
> (b) an agreement for the purpose of injuring Inokom and Quasar;
>
> (c) that acts done in execution of that agreement resulted in damage to Inokom and Quasar;
>
> (d) damage is an essential element and where damage is not pleaded the Statement of Claim may be struck out ...
>
> [33] It is clear that the very first element to be shown must be an agreement between two or more persons for the purpose of injuring Inokom and Quasar. 'Agreement' is not limited to a signed and sealed agreement but any informed agreement, including a combination of efforts of the alleged co-conspirators ...

Since the learned High Court judge found, in para 15 of her grounds of judgment, that:

> ... Mahkamah mendapati defendan 2 sama sekali tidak terlibat dalam membantu defendan 1 dalam kes ini. Segala tindak tanduk perlakuan defendan 1 tidak melibatkan defendan 2. Dengan ini, mahkamah menolak tuntutan plaintiff ke atas defendan 2 dengan kos RM2,000

the whole of the plaintiff's case on the cause of action for conspiracy to defraud and misrepresent to the plaintiff must also fall vis the first defendant. But the learned High Court judge found otherwise.

Whether the first defendant had exercised undue influence upon the plaintiff

[37] We also found that there was an inconsistency in the finding of the learned High Court judge on the issue of undue influence. The High Court judge made the finding of undue influence by relying on the evidence of SP2. Paragraph 14 of her grounds of judgment is reproduced herewith for reference:

> [14] Salahnyata/misrepresentasi oleh defendan 1 dalam kes ini sangat ketara malah

mahkamah percaya kewujudan elemen pengaruh tidak berpatutan (undue influence) oleh defendan 1 ke atas plaintif turut dibuktikan semasa kejadian. Ini kerana keterangan SP2 juga menunjukkan betapa plaintif mempercayai bulat-bulat pengataan defendan 1 bahawa tandatangannya diperlukan untuk membolehkan proses penukaran geran hakmilik yang lama kepada yang baru dapat dibuat.

[38] Meanwhile, at para 19 of her grounds of judgment, the learned High Court judge found that the execution of the Form 14A by the plaintiff was made voluntarily, albeit he did not understand the contents of the form (which we found to be otherwise). We were of the view that there was a material inconsistency in this finding that required an appellate intervention. Since the execution of the transfer was made voluntarily, in the circumstances of this case the alleged exercise of undue influence upon the respondent was non-existent.

CONCLUSION

[39] The majority opinion of this court found that there was no fraudulent misrepresentation by the first defendant to the plaintiff, let alone any conspiracy to do so. The signing of the Form 14A was done accordingly and voluntarily. The plaintiff understood the contents of Form 14A and its effects and consequences as explained to him by SD1.

[40] Pursuant to our finding that the execution of the Form 14A was done voluntarily, it was also the majority decision of this court that there was no undue influence exercised by the first defendant on the plaintiff.

[41] For the reasons stated above, the appeal was allowed by a majority with costs of RM10,000 and the deposit was refunded to the appellant.

Abdul Rahman Sebli JCA (delivering dissenting judgment of the court):

[42] In this judgment I shall refer to the appellant as 'the son' and the respondent as 'the father'. This is a dispute between father and son over the transfer to the son of a parcel of land held under GM91, Lot 2555, Mukim Rasah, Negeri Sembilan ('the land').

[43] The father, who was 69 years old, sick and illiterate at the time of the transfer in 1999, was the registered owner of the land. It was the son who suggested and who brought the father to the land office to effect transfer of the land to himself. The consideration for the transfer was purported to be natural love and affection. Upon realising that the land had been transferred to the son, the father lodged a police report and entered a registrar's caveat to protect his interest over the land.

[44] In the court below the father applied, inter alia, for a declaration that the transfer of the land to the son was null and void on the ground of misrepresentation and/or fraud and/or undue influence. He succeeded, hence this appeal by the son who was dissatisfied with the decision.

[45] After hearing submissions both oral and written from both sides on 25 August 2015, we came to a split decision whereby my learned brother Justice David Wong Dak Wah and my learned sister Justice Umi Kalthum Abdul Majid allowed the son's appeal with costs while I dissented. These are my grounds for dissenting.

[46] I do not propose to go into the details of the evidence but suffice for me to point out that in allowing the father's claim, the learned trial judge had made the following firm findings of fact which findings were based on actual evidence before him:

(a) that the son had fraudulently misrepresented to the father that the Form 14A that the father was asked to sign was a document for the issuance of a new title to replace the old title, and not to transfer the land to his own name;

(b) that the son had exercised undue influence over the father in causing him to sign the Form 14A;

(c) that the father was telling the truth when he said that he could not speak Malay (he could only speak Tamil) and was illiterate and therefore did not understand what the assistant land administrator, Seremban ('the assistant land administrator') explained to him in Malay before he signed the Form 14A;

(d) that the father fully trusted the son;

(e) that the father did not understand at all the contents and effect of the Form 14A that he signed; and

(f) that the son being in a position of active confidence to the father failed to prove the good faith of the transaction pursuant to s 111 of the Evidence Act 1950.

[47] There can be no argument that these findings of fact involved the question of the credibility of the witnesses and they relate directly to the issues before the court, namely:

(a) whether the father was owner of the land;

(b) whether the father was fraudulently misrepresented by the son into signing the Form 14A to effect transfer of the land to the son;

(c) whether the father who was old, sick and illiterate understood what the assistant land administrator explained to him before he signed the Form 14A; and

(d) whether the son had discharged his burden of proof under s 111 of the Evidence Act 1950.

[48] It is a principle of great antiquity that an appellate court should be slow to interfere with findings of fact made by the court of first instance to which the law entrusts the primary task of evaluating the evidence presented before it. The law reports are replete with high authorities for this trite proposition of law, one of which is the decision of the Judicial Committee of the Privy Council in *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41b, a case that emanated from Malaysia. I shall quote *in extenso* what Lord Fraser of Tullybelton delivering the judgment of the Judicial Committee said at pp 41–42:

> The trial judge's decision on the first question, the question of fact, was reached after he had heard a considerable volume of evidence, some of it sharply conflicting, and had accepted the appellants' evidence, and rejected the respondent's. The principles on which an appellate court should act in reviewing the decision of a judge of first instance on a question of fact have been stated in many cases in the House of Lords and in this Committee, and it will be appropriate to quote from two of them. In *Watt or Thomas v Thomas* [1947] AC 487 at p 487 Lord Thankerton said this:
>
> > (1) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.
> >
> > (2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
> >
> > (3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakeably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.
>
> That passage was quoted with approval in the judgment of this Board, delivered by Lord Guest in *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 87, 92. When Lord Thankerton referred in paragraph (1) to 'the printed evidence' he was referring to a transcript of a verbatim shorthand record of the evidence, such as was available in that case. But in the instant appeal all that the Federal Court had before it was the judge's notes of the evidence, perhaps augmented in places by a transcript of shorthand notes, and it is obvious that the disadvantages under which an

appellate court labours in weighing evidence are even greater when it has to rely on such an incomplete record than when it has a verbatim transcript.

The second case from which it is appropriate to quote is *Powell and wife v Streatham Manor Nursing Home* [1935] AC 243, 249 where Viscount Sankey LC said this:

> What then should be the attitude of the Court of Appeal towards the judgment arrived at in the court below under such circumstances as the present? It is perfectly true that an appeal is by way of rehearing, but it must not be forgotten that the Court of Appeal does not rehear the witnesses. It only reads the evidence and rehears the counsel. Neither is it a reseeing court. There are different meanings to be attached to the word 'rehearing'. For example, the rehearing at Quarter Sessions is a perfect rehearing because, although it may be the defendant who is appealing, the complainant starts again and has to make out his case and call his witnesses. The matter is rather different in the case of an appeal to the Court of Appeal. There the onus is upon the appellant to satisfy the court that his appeal should be allowed. There have been a very large number of cases in which the law on this subject has been canvassed and laid down. There is a difference between the manner in which the Court of Appeal deals with a judgment after a trial before a judge alone and a verdict after a trial before a judge and jury. *On an appeal against a judgment of a judge sitting alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the court that the judge was wrong and that his decision ought to have been the other way. Where there is a conflict of evidence the Court of Appeal will have special regard to the fact that the judge saw the witnesses*: see *Clarke v Edinburgh Tramways Co per Lord Shaw,* 1919 SC (HL) 35, 36, where he says:
>
> > When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? *In my opinion, the duty of the appellate court in those circumstances is for each judge of it to put to himself, as I do now in this case, the question, Am I - who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case - in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment*'. (Emphasis added.)

[49] Where, however, the determination of a question of fact does not turn on the credibility of the witnesses whom the trial judge had seen and heard, an appellate court is of course not bound by any inference of fact drawn by the judge: see *Benmax v Austin Motor Co Ltd* [1955] AC 370 at p 376. In that situation the question of fact remains at large and an appellate court is placed in the same position as the trial court in dealing with the issue of fact involved.

[50] But the present appeal does not fit into that class of cases. Here we are dealing with a situation where the oral testimony of the father and the son over the question of whether the father had willfully transferred the land to the son was in sharp conflict. Clearly a determination of this question of fact turned on their credibility and reliability as witnesses. It is therefore not a matter of drawing inferences of fact from their evidence but to determine who between them was telling the truth. Obviously this is not a matter which this court is placed in the same position as the trial court.

[51] Applying the principles applicable and to paraphrase Lord Shaw in the case last cited by Lord Fraser of Tullybelton in *Choo Ah Pat,* the duty of each of us in the present appeal is to put to ourselves the question whether, without the advantages that the trial judge had in seeing and hearing the witnesses, we are in a position to come to a clear conclusion that the judge was plainly wrong in accepting the evidence of the father in preference to the evidence of the son. My answer to the question is in the negative.

[52] In *Samar binte Mansor v Mustafa Kamarul Ariffin* [1974] 2 MLJ 71, a case that was decided before *Choo Ah Pat*, Raja Azlan Shah FJ (as His late Royal Highness then was) in a dissenting judgment raised the question of whether an appellate court should substitute its own views of the facts for that of the trial judge. His Lordship then went on to say:

> For an appellant to succeed in an appeal against a finding of fact made by a single judge, he must convince the appellate court that the learned judge was wrong in his conclusion. That the appeal is by way of rehearing does not alter the situation. A hearing is not, however, a retrial of the issues. The question is not whether an appellate court can substitute its views of the facts which of course it is empowered to do so, but whether it should do so. However much an appellate court may be in an equal position with the trial judge as to the drawing of inferences, it ought not to reverse the finding of facts unless it is convinced that it is wrong. *If that finding is a view reasonably open on the evidence, it is not enough to warrant its reversal just because an appellate court would have come to a different view. Merely differing views do not establish that either view is wrong, but in balancing these two views an appellate court should give due weight to the nature of the facts as found by the trial judge*. (Emphasis added.)

[53] From the grounds of judgment, it is abundantly clear that the learned

trial judge had properly and adequately dealt with the evidence and had not misdirected herself, either in law or on the facts. She had sufficiently applied her mind to all the relevant evidence and issues before the court and her conclusion was reached after a careful assessment and evaluation of the conflicting versions of events. That being the case, it would be wrong in my view for us to substitute her conclusion with that of our own. The right thing to do in the circumstances would be to defer to her judgment.

[54] Counsel for the son emphasised the point that the assistant land administrator who witnessed the signing of the Form 14A by the father was a disinterested witness and therefore his evidence should have been accepted by the learned trial judge.

[55] The assistant land administrator may be an independent witness but it was also his evidence that he was unsure if he had explained to the father the consequences of signing the Form 14A, and that he would lose his rights over the land if he did so. He did not even ask the father if he could read or write.

[56] More importantly, he was unsure if the father understood that by signing the Form 14A, he was giving away the land to the son. This is a fatal missing link in the son's case as it was the assistant land administrator's statutory duty under para (iv) of Form 14A to make sure that the father fully understood that by signing the Form 14A, he was transferring the land to his son, with love and affection as the consideration. This was absolutely necessary as the father was illiterate and did not understand Malay (as found by the learned trial judge), the language that the assistant land administrator used to communicate with him.

[57] Of course the assistant land administrator claimed that the father could understand Malay but this part of his evidence must be disregarded as it was rejected by the trial judge. The learned judge made a clear finding of fact that he had failed in his duty, resulting in the father not understanding the consequences of signing the Form 14A. What the father understood was that the transaction was to change the old title to a new one, as represented to him by the son. This finding of fact could only lead to a finding in law that the transfer was null and void.

[58] In *Inche Noriah v Shaik Allie bin Omar* [1929] AC 127 Lord Hailsham made the following pertinent observations at p 135:

> It is necessary for the donee to prove that the gift was the result of the free exercise of independent will. The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the Court that the donor was acting independently of any influence from the donee

and with the full appreciation of what he was doing; and in cases where there are no other circumstances this may be the only means by which the donee can rebut the presumption.

[59] There is evidence that the father's solicitors had written to the son asking him to rebut the allegation that the transfer was done by misrepresentation, fraud and undue influence. Despite the seriousness of the allegation, the son did not even bother to reply.

[60] It is clear that the son had failed to prove that the gift was made 'after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the Court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing': *Inche Noriah*.

[61] Having regard to the findings of fact made by the learned trial judge on all material issues and the principles involved, I am of the view that this is not a fit and proper case for this court to interfere with the conclusion reached by the trial judge. It was for this reason that with the greatest of respect and humility I dissented from my learned brother and sister and dismissed the son's appeal with costs.

Appeal allowed with costs.

Reported by Afiq Mohamad